Supreme Court, U. S.
FILED
JUN 4 1979
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-1816

MILTON PARNESS,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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No. .

MILTON PARNESS,
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v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Milton Parness petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit affirming the District Court's denial of his motion for relief pursuant to 28 U.S.C. § 2255.

Opinions Below.

The opinion of the United States District Court for the Southern District of New York denying the petition for relief is unreported and is found in Appendix A, *infra*. The opinion of the Court of Appeals, also not reported, is found in Appendix B, *infra*. A petition for rehearing and suggestion for rehearing *en banc* was denied on March 6, 1979. Appendix C, *infra*. This Court has jurisdiction to review the judgment below under the provisions of 28 U.S.C. § 1254(1).

Jurisdiction and Proceedings Below.

The petitioner, Milton Parness, was convicted in October 1973, in the District Court for the Southern District of New York after a thirteen-day jury trial. The court imposed a ten-year sentence and a $55,000 committed fine upon his conviction of engaging in a pattern of racketeering activity by causing two checks (representing allegedly stolen property) and one person (Allan Goberman, the Government's main witness at trial) to travel in interstate commerce as part of a scheme to defraud. On appeal, his conviction was affirmed by the United States Court of Appeals for the Second Circuit, *United States* v. *Parness*, 503 F. 2d 430 (1974), and a petition for a writ of certiorari was denied, 419 U.S. 1105 (1975). A motion for a new trial was denied, 408 F. Supp. 440 (1975), and that denial affirmed on appeal, 536 F. 2d 474 (1976) (denying stay of mandate), *cert denied*, 429 U.S. 820 (1976).

Subsequently, the petitioner — locked in civil litigation brought by his accuser at the then-completed criminal trial, who claimed to have lost his hotel and casino property through Parness' fraud — obtained access to substantial portions of the

Government's investigative file from the criminal proceedings. These materials were surrendered to Parness and his counsel[1] in the civil proceedings as the result of the issuance of a subpoena *duces tecum* out of the United States District Court for the District of New Jersey directed to the Department of Justice Strike Force No. 18 office in Washington, D.C.

Parness, with crates of documents and extensive time to examine and study them in his quarters at the Metropolitan Correctional Center in New York, eventually discerned the coded meaning, and the critical import, of certain financial records and tally sheets in Goberman's handwriting, which documents demonstrated what the defense had been unsuccessful in conveying to the jury at the criminal trial — namely, that Goberman was lying from the witness stand, that he had never been defrauded by Parness, and that the "crimes" that Goberman described were concocted by a bitter loser in a financial fiasco of his own making.[2]

In other words, Parness succeeded in culling from the complaining witness' own records (which, the Government admits, had reposed in the Government's files at the time of the criminal trial), in the witness' own handwriting, entirely convincing (indeed, indisputable) evidence that Parness was guilty of no offense. In fact, the documents went so far as to demonstrate that the crimes alleged in the indictment returned

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[1] Parness himself had not had the opportunity to review these dramatic documents prior to or during the criminal trial.

[2] As later became apparent, Goberman's primary motive in blaming on Parness his (Goberman's) loss of the casino and hotel property at issue was Goberman's understanding that he could recover the hotel/casino from Parness under the civil forfeiture provisions of the Racketeer Influenced Corrupt Organizations statute, 18 U.S.C. § 1964. When the Government refused to bring a proceeding to help Goberman recover the hotel/casino from Parness, Goberman sued the Government for $17,000,000 in an effort to force the Government to compensate him for the loss of the hotel.

against Parness had not even occurred and that it was Goberman who owed Parness substantial sums.[3]

Armed with these dramatic proofs, Parness' counsel drew up the appropriate papers for commencing a collateral attack on the conviction, pursuant to 28 U.S.C. § 2255, including extensive affidavits, presentations of the documents themselves, and a thorough memorandum of fact and law explaining the documents' "code" and the reasons that relief from conviction — and speedy release on bail — were required by law and justice.

Prior to the presentation of these papers to the court, Parness' counsel made them available to the Government for its independent review, with the expectation that a joint application might be made to the court for relief. After some months, the Government having failed to formulate its position, the petitioner filed his papers with the court.

Passing over entirely Parness' request that he be given an opportunity to prove his innocence, the court convened a hearing at which it took evidence solely on the issue whether the documents had been made available to the defense at the time of the criminal trial; that is, the court considered *only* the issue whether there had been any violation of the principles of *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *Giles* v. *Maryland*, 386 U.S. 66 (1967). It refused even to hear evidence on the petitioner's claim that he was wholly innocent and was willing to prove that innocence to the court if he had but brief

[3] In fact, in the civil action brought by Goberman, the United States District Court for the District of New Jersey entered a judgment in the amount of $154,007, against Goberman, in petitioner Parness' favor, on Parness' counterclaim filed in that case. Parness thus has the dubious fortune of having won the civil action (with a judgment of dubious collectability) and lost the criminal action (with a sentence of 10 years and a substantial fine), even though both actions turned on precisely the same factual issue — did Parness cheat Goberman out of the latter's hotel/casino by withholding payment to Goberman of funds allegedly owed by Parness to Goberman?

opportunity to explain any of the "new" documents which might not have been adequately elucidated in the submission drawn up by his counsel in support of his § 2255 motion.[4]

The District Court's opinion disposed of only the *Brady* issues. It found that the petitioner had failed to adduce adequate evidence to prove that the documents had not been turned over to the defense, so that relief was not warranted on that ground.[5] As for the petitioner's claim (and his offer to prove) that he was and is wholly innocent and that the crime for which he had been serving a sentence never even occurred, the District Court announced, with no analysis whatsoever, that the petitioner's "prolix pages of materials" could properly be considered as no more worthy of judicial relief than the petitioner's earlier efforts to obtain a new trial (on other grounds and evidence) prior to his surrender to commence the serving of his sentence.

The brief unpublished opinion of the Court of Appeals affirming the District Court's denial of relief likewise gave short shrift to Parness' request for, at the very least, a brief hearing on his innocence. The panel posited that, since the defense, according to the facts found by the District Court, had been aware of the existence of the "new" documents at the time of

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[4] Indeed, in its responsive papers in the District Court, the Government declined to address the merits of Parness' innocence contentions, and did not speak at all to the meaning of the documents that Parness had uncovered. The Government, in its papers, said that it did not have to even discuss those issues, since the District Judge indicated that he wanted to hear evidence only on the question whether the documents had or had not been disclosed to defense counsel at the trial.

[5] At the evidentiary hearing, both Parness and his trial counsel swore that they had never seen the documents prior to or at trial. Government counsel did not state that the documents had been turned over, but merely said that it was likely that they had been turned over. On the basis of this evidence, the District Judge found that the documents probably were turned over, or at least petitioner Parness had not proven to the contrary.

the criminal trial, they were not even newly discovered evidence and were, thus, not grounds for a Rule 33 motion, let alone a collateral attack.

In effect, the District Court and the Court of Appeals ruled that, even if the exculpatory meaning of documents in the Government's files had remained unknown to both the prosecution and the defense at the time of the trial, the discovery that these documents exculpate a convicted defendant beyond any doubt whatsoever is an insufficient basis for *habeas* jurisdiction where there was no attendant *Brady* violation — that is to say, where defense counsel had access to the docuuments as part of a massive turnover of documents just prior to the commencement of trial.[6]

Thus, in a curious and perverse twist of the query posed by the now-famous article by Judge Friendly, the Second Circuit Court of Appeals has ruled that, yes, innocence *is* irrelevant to the availability and disposition of a collateral attack upon a criminal conviction, even where the evidence establishing innocence resided in the Government's own files at the time of trial. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142 (1970). The innocent petitioner who complains of nothing more than an unjust and unwarranted conviction — an injustice and an innocence which he offers to demonstrate beyond any real doubt — has no remedy under 28 U.S.C. § 2255.

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[6]The Government has not disputed Parness' claim that he personally did not have access to or see the disputed documents. The Government's case rests upon its argument that Parness' counsel — who did not understand the import and meaning of the documents until Parness explained it to him long after the trial — must have seen the documents when the contents of an entire filing cabinet were made available to his inspection just prior to trial, at the United States Attorney's office. (The Government, it is interesting to note, never made a flat claim that the critical documents *were in fact* in the turned-over filing cabinet. The Government simply argued the high probability that this was so.)

Constitutional and Statutory Provisions Involved.

UNITED STATES CONSTITUTION.

Article I, Section 9, Clause 2.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

Fifth Amendment.

No person shall . . . be deprived of life, liberty, or property, without due process of law . . ..

28 U.S.C. § 2255 provides in pertinent part:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

. . . . . .

If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the

prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

Question Presented.

Whether a federal prisoner who has acquired clear — indeed, overwhelming — evidence from the Government's own files (where that evidence reposed during the trial itself) proving that the crime for which he was convicted did not occur — and that he is, therefore, innocent of that offense — has he any remedy pursuant to 28 U.S.C. § 2255 or must he, instead, be relegated to seeking executive clemency for relief from his wrongful conviction and imprisonment; and whether the federal courts have other residual, statutory, or supervisory powers to vacate a sentence and conviction in cases of manifest injustice when a prisoner is incarcerated as the result of a wrongful conviction for a crime which never even occurred?

Statement of Facts.

These dramatic issues arise in the context of a most unusual criminal case and subsequent civil proceedings. It is not many criminal defendants, convicted solely on the testimony of their "victim" who claimed to have been defrauded, who then turn around and take the offensive and obtain a substantial money judgment against the professed "victim" for sums over and above the amount the "victim" claimed to have lost as the result of the defendants' "fraud." But just such a table-turning took place in this case.

Milton Parness was convicted solely on the testimony of Allan Goberman that Parness had cheated him out of his interest in a casino and resort hotel. Goberman's testimony, and the Government's theory, was that Parness withheld from Goberman monies that Parness owed Goberman, thereby

forcing Goberman into bankruptcy and allowing Parness' straws to gain ownership of Goberman's hotel/casino. Carrying his victory in the criminal trial to the civil side, Goberman brought suit in the District of New Jersey against Parness for millions of dollars. Parness denied any fraud and counterclaimed for monies due *him* from Goberman. After discovery proceedings and the acquisition of crucial materials from the Government's investigation file for the criminal case, Parness succeeded in obtaining a civil judgment against his "victim" in the amount of $154,007. Indeed, rather than having underpaid Goberman, Parness had in fact advanced to Goberman *more money* than Parness owed him, according to Goberman's own calculations in the Government's files.

With the crucial documents culled from Government files demonstrating his innocence, Parness sought relief from a glaringly unjust conviction by petitioning the criminal trial court for *habeas corpus* relief pursuant to 28 U.S.C. § 2255. His moving papers alleged a series of violations by the Government of its duty to disclose exculpatory materials and to make disclosure concerning its doubts about the truthfulness of its witness Goberman. But, more importantly, Parness pled his innocence of the "crimes" for which he had then served over two years in prison, alleging as ground for relief the fact that documents proving his innocence lay in the Government's own files at the time of his criminal trial and were not (for whatever reason) shown to the jury.

He sought the opportunity to demonstrate his innocence to the court's satisfaction at an evidentiary hearing, at which time he might testify, present full explanation of the documents — Goberman's own financial records in his own handwriting — discovered in the Government files during the course of the civil proceedings, and be subjected to cross-examination.[7]

[7] Too, he sought Goberman's appearance in court. However, the court refused to issue a subpoena to secure his attendance.

This opportunity was denied, despite the federal *habeas* statute's providing that a hearing "shall" be held "unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." And the District Court's refusal to convene a hearing on Parness' innocence and the meaning of the documents was affirmed on appeal.

Thus, the District Court and the Court of Appeals are of the view that innocence provides no ground for *habeas* relief. The courts below agreed with the Government's position that innocence "might be urged as the proper subject for executive clemency, but it affords no basis for judicial action." *Shaver* v. *Ellis*, 255 F. 2d 509, 511 (5th Cir. 1958) (cited in Government's Brief on appeal at 18-19).[8]

In support of its claim that the innocent *habeas* petitioner has no remedy in the courts on grounds of "mere" innocence, the Government has cited (although the courts have neither discussed nor analyzed) a collection of decisions from seven of the Courts of Appeals, to the effect that a defendant may not collaterally attack his conviction on grounds of innocence alone.[9] The Government has further claimed that this Court has actually endorsed this bizarre remedial gap in *Townsend* v. *Sain*, 372 U.S. 293 (1963), when it stated, at 317, that "the existence merely of newly discovered evidence relevant to the

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[8] Neither the District Court nor the Court of Appeals dealt with the additional twist presented in this case — the fact that the evidence proving innocence was in the Government's possession at the time of trial.

[9] *Figueroa* v. *Saldana*, 23 F. 2d 327, 328 (1st Cir. 1927), *cert. denied*, 277 U.S. 574 (1928). See also *Anderson* v. *Maggio*, 555 F. 2d 447, 451 (5th Cir. 1977); *Sinclair* v. *Turner*, 447 F. 2d 1158, 1161 (10th Cir. 1971), *cert. denied*, 405 U.S. 1048 (1972); *Woodson* v. *Brewer*, 437 F. 2d 1036, 1040 (8th Cir. 1971); *United States ex rel. Bongiorno* v. *Ragen*, 146 F. 2d 349, 351 (7th Cir.), *cert. denied*, 325 U.S. 865 (1945); *Graham* v. *Squier*, 145 F. 2d 348, 349 (9th Cir.), *cert. denied*, 324 U.S. 845 (1945); *Hauck* v. *Hiatt*, 141 F. 2d 812, 813 (3d Cir. 1944); *United States* v. *Kaplan*, 101 F. Supp. 7 (S.D. N.Y. 1951) (Weinfeld, J.).

guilt of a state prisoner is not a ground for relief on federal habeas." The Government professed to know no reason why this principle should not likewise apply to federal prisoners. And, by their rulings, neither apparently did the courts below. Moreover, neither of the courts below addressed the additional, and perhaps critical, factor present in this case — the evidence proving innocence was in the Government's files at the time of trial.

Reasons for Granting the Writ.

The opinion of the Court of Appeals means that an innocent federal prisoner who can proffer the evidence (which the Government admits was in its files at the time of trial but which never made its way to the trial jury) which will *prove* his innocence — not merely undercut the Government's evidence against him at trial or just bolster already introduced exculpatory proofs[10] — has no *habeas* remedy. If this startling conclusion is truly the law of the land, this Court has the *responsibility to announce* that disturbing fact so that the Congress might take appropriate action. And if the lower court's ruling that a petitioner who can prove his innocence[11] in these circumstances is entitled to no judicial relief is contrary to the law — which, we feel assured, it is, and contrary to civilized standards of justice — then the judgment below should be vacated and the petitioner granted the opportunity to present the evidence of his innocence to the District Court with the Government being given an opportunity to try to contradict the petitioner's evidence, if it so chooses.

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[10] Compare the "newly discovered evidence" merely "relevant to the [prisoner's] guilt" dealt with by the opinion in *Townsend* v. *Sain*, 372 U.S. at 317.

[11] The vision of a supposed murder victim being discovered alive and well is the heuristic device employed during the course of the proceedings in the courts below.

For surely innocence — proven by documents possessed (even if not understood) by the Government at the time of trial — is sufficient to trigger the availability of the Great Wit — the "swift and imperative remedy in all cases of illegal restraint or confinement." *Braden* v. *30th Judicial Circuit Court*, 410 U.S. 484, 490 (1973), quoting *Secretary of State for Home Affairs* v. *O'Brien*, [1923] A.C. 603, 609 (H.L.). And surely no picayune, formalistic parsing of the decisional law with regard to the availability of the writ in certain cases can serve to deny an innocent petitioner a hearing on his innocence. Instead,

> The scope and flexibility of the writ — its capacity to reach all manner of illegal detention — its ability to cut through barriers of form and procedural mazes — have always been emphasized and jealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected. *Harris* v. *Nelson*, 394 U.S. 286, 291 (1969).

Surely this Court, in its decision in *Davis* v. *United States*, 417 U.S. 333, 346 (1974),[12] meant to bring innocence (espe-

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[12] Indeed, the dissenting member of this Court in *Davis* recently observed that

> It would be extraordinarily troubling in any system of criminal justice if a verdict or finding of guilt, later shown to be based on false testimony, were to result in the incarceration of the accused notwithstanding this fact. *Franks* v. *Delaware*, ___ U.S. ___, 98 S. Ct. 2674 (1978)

(Rehnquist, J. dissenting). It would be even more "extraordinarily troubling" if, once the accused had been incarcerated a number of years, he ac-

cially when proven by documents possessed by the Government at the time of trial) within the purview of claims for which § 2255 relief is available, when it ruled that that remedy may be employed when

> . . . the claimed error of law [is] "a fundamental defect which inherently results in a complete miscarriage of justice" and [when] "[i]t . . . present[s] exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent."

Parness' case, then, is at the opposite end of the spectrum from the situation presented by the complaining prisoner in *United States* v. *Timmereck*, ____ U.S. ____, 47 U.S.L.W. (May 21, 1979). That defendant pled guilty, failed to appeal, and then — two years later — sought § 2255 relief on the ground that procedures set out by Fed. R. Cr. P. 11 were violated when the court failed to inform him fully concerning a mandatory special parole term before accepting his guilty plea. This Court recalled its ruling in *Hill* v. *United States*, 368 U.S. 424 (1962), presenting a similar claim that a violation of Rule 32(a) concerning advising a defendant of his right of allocution should entitle a guilty-pleading defendant to obtain relief under § 2255:

> The failure of a trial court to ask a defendant represented by an attorney whether he has anything to say before sentence is imposed is not of itself an error of the

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quired from the Goverment's own files (where it reposed even at the time of trial) the evidence which showed that he had been convicted on the basis of false testimony and was actually innocent, yet the accused had no remedy and was instructed to continue serving his sentence by the court to which he appealed for relief.

> character or magnitude cognizable under a writ of habeas corpus. It is an error which is neither jurisdictional nor constitutional. It is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure. It does not present "exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent. . . ." 368 U.S. at 428 (citation omitted).

Likewise, a formal violation of Rule 11 does not give rise to § 2255 relief.

But what could be a more disconcerting defect than an imprisoned innocent defendant? Would not such a "defect" make out the quintessential "miscarriage of justice," particularly where, as here, the documents that prove that the crime never even occurred actually were in the prosecution's own files at the time of trial?

And this petitioner, unlike Timmereck, did not plead guilty. For the same reasons that finality principles should be more firmly applied to defendants who have pled guilty yet, nevertheless, seek § 2255 relief, the criminal law must remain appropriately "nonfinal" when circumstances develop indicating that an innocent defendant has been convicted and incarcerated.

This is such a case. The unseemly ruling of the Court of Appeals that a § 2255 petitioner who offers to prove his innocence may be denied that opportunity because he has no *habeas* remedy cannot be the law. It should not be left undisturbed for — even if never formally reported — it remains a blot upon the law as well as an injustice to the individual petitioner.

Conclusion.

For the foregoing reasons, the petitioner respectfully requests this court to grant the petition for a writ of certiorari and to set this case down for argument.

Respectfully submitted,

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Appendix A.

UNITED STATES DISTRICT COURT
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UNITED STATES OF AMERICA

v. 78 Civ. 2446
(73 Cr. 750)

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Memorandum.

BONSAL, D.J.

Petitioner Milton Parness moves pursuant to 28 U.S.C. § 2255 to vacate his conviction and sentence. On October 1973 Parness was convicted by a jury of acquiring control of the St. Maarten Isle Hotel Corporation in St. Maarten, Netherlands Antilles through a pattern of racketeering in violation of 18 U.S.C. §§ 1961, 1962(b), and 1963 (Count 1), of two counts of causing interstate transportation of stolen property, 18 U.S.C. § 2314 (Counts 4 and 6), and one count of causing a person to travel in interstate commerce in furtherance of a scheme to defraud, 18 U.S.C. § 2314 (Count 5).[1] On December 7, 1973, he was sentenced to concurrent ten-year terms of imprisonment on each of the four counts and was fined a total of $55,000. The Second Circuit affirmed his conviction (503 F.2d 430 (2d Cir. 1974)), and the Supreme Court denied certiorari (419 U.S. 1105, 95 S.Ct. 775, 42 L.Ed.2d 801 (1975)).

Parness then moved for a new trial on the basis of newly discovered evidence uncovered during a civil action brought by Allan Goberman (the Government's key witness at trial) against Parness in the United States District Court for the District of New Jersey on February 5, 1974 ("the New Jersey civil action"). On September 29, 1975, this motion was denied (408 F. Supp. 440 (S.D. N.Y. 1975)),[2] and the Court of Appeals affirmed without opinion on January 7, 1976 and de-

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[1] Parness' wife, Barbara Parness, was a co-defendant at his trial and was convicted on counts 4, 5, and 6.

[2] On September 29, 1975, the Court also denied Parness' motion to reduce sentence pursuant to Fed. R. Cr. P. 35.

nied Parness' motion for a stay of the mandate on January 12, 1976 (536 F.2d 474 (2d Cir. 1976)).

The present motion is also based on newly discovered evidence uncovered during the New Jersey civil action. Parness contends that certain documents (now marked as exhibits C-L), which are allegedly in Goberman's handwriting and were subpoenaed from the Department of Justice Strike Force 18 for his use in the New Jersey civil action, constitute newly discovered evidence, and alleges that the Government suppressed them during the criminal trial. He argues that these documents — mostly scratch paper filled with columns of numbers — disclose that Parness owed Goberman at most $184,838.50 as opposed to the $350-400,000 figure to which Goberman testified at the criminal trial. The significance of the lower figure, Parness claims, is that it demonstrates — combined with evidence relating to the amount of money Parness remitted to Goberman — that he not only paid Goberman what he owed him but overpaid him. This overpayment, according to Parness, demonstrates his innocence because his conviction rested upon a jury's finding that he "swindled Goberman out of Goberman's stock interest in a hotel corporation by [his] withholding from Goberman money that [he] collected on gambling markers that should have been turned over to Goberman." Parness concludes that the Government suppressed exhibits C-L, violating *Brady* v. *Maryland*, 373 U.S. 83 (1963), *Giglio* v. *United States*, 405 U.S. 150 (1972), the Jencks Act, 18 U.S.C. § 3500, and Parness' due process rights. However, the Government contends that "the documents upon which Parness now relies were in fact among the discovery materials provided to defense counsel."

On July 19 and July 27, 1978, the Court held an evidentiary hearing to determine whether exhibits C-L had been made available to the defense before trial. The following testimony was developed at that hearing:

Michael Rosen, who assisted Roy Cohn in the defense of Parness at the criminal trial and who defended Parness in the New Jersey civil action, testified that there was "no doubt in [his] mind" that he had not seen exhibits C-L until late October or early November, 1977 at which time they had been subpoenaed from Strike Force 18 in connection with the New Jersey civil action. Rosen also testified that he went to the U.S. Attorney's office at least once before the criminal trial in order to receive copies of the exhibits and an exhibit list but spent only some 10-15 minutes there. (By affidavit filed May 26, 1978, Roy Cohn stated that he had not seen exhibits C-L "until in or about November of 1977.") Parness testified that he had reviewed with Cohn and Rosen all the documents which were made available by the Government in the criminal case and that he had not seen exhibits C-L until November, 1977.

William Glase, a retired Internal Revenue Service Special Agent who assisted the Government in the criminal case, testified that he was instructed by either A.U.S.A. McGuire or Special Attorney Dowd to make all of the documents the Government had in the Parness case available to the defense.[3] Shortly before the commencement of the trial, he emptied the entire contents of the Government file cabinet containing the documents onto a desk outside A.U.S.A. McGuire's office for Rosen's inspection. On instruction, he stood by the desk while Rosen examined the documents, which he recalls took about an hour. Finally, he testified that he saw Rosen at the U.S. Attorney's office on at least two occasions.

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[3] At one point Glase testified that he thought it was McGuire who gave him the instruction to make the documents in the Parness case available to the defense.

Special Attorney Dowd[4] testified that pursuant to McGuire's instructions all the files had been made available to the defense (with the exception of the trial book which contained the Government's trial strategy, questions, notes, an exhibit list, and a copy of the indictment) and that Rosen spent the better part of two afternoons examining documents in the Parness case.

DISCUSSION.

In a collateral attack on a criminal conviction, the party seeking relief has the burden of persuasion. *E.g.*, *Johnson* v. *Zerbst*, 304 U.S. 458, 468-9 (1938); *Klein* v. *Smith*, 559 F.2d 189 (2d Cir. 1977); *Williams* v. *United States*, 481 F.2d 339, 346 (2d Cir. 1973). Parness argues, however, that once the petitioner proves a prima facie case, the burden of persuasion shifts to the Government. However, as Judge Timbers stated in *Williams* v. *United States*, *supra*,

> "It is hornbook law that a collateral attack on a criminal conviction must overcome the threshold hurdle that the challenged judgment carries with it a presumption of regularity, Johnson v. Zerbst, 304 U.S. 458, 468 (1938), and that the burden of proof is on the party seeking relief. E.g., Zovluck v. United States, 448 F.2d 339, 341 (2 Cir. 1971), cert denied, 405 U.S. 1043 (1972). The rule that there is a burden on the government to meet attacks on the constitutionality of prior convictions, e.g., United

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[4]McGuire was in Peru and unavailable to testify at the July 19, 1978 hearing. Although Parness argued that he was entitled to call McGuire before the Court made a decision, he declined to call him once the Government made him available on July 27. The Government decided not to call him as well.

> States ex rel. Savini v. Jackson, 250 F.2d 349, 355 (2 Cir. 1957), is not to the contrary. . . . Those cases . . . do not relieve the moving party of the burden of proving the allegations in a post-conviction motion."

As the Government has correctly pointed out, Parness' counsel has confused the burden of *persuasion* with the burden of *production*. Once the petitioner makes out a prima facie case, the burden of *production* shifts to the Government. If the Government fails to satisfy its burden of coming forward with rebutting evidence, the Court must grant petitioner's motion; if it does satisfy its burden of production, the burden of persuasion still lies with the petitioner. *See Developments in the Law — Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1140 (1970); IX Wigmore on Evidence § 2489 (3d ed. 1940). The Court finds here that the petitioner has failed to sustain his burden of proof that exhibits C-L were not made available to him prior to trial, *cf. Ostrer* v. *United States*, Dkt. No. 77-2103 (2d Cir. April 18, 1978), slip op. at 2620.

First, both Glase and Dowd testified that Glase had emptied the entire Government file for Rosen to examine. Although neither of them could recall exhibits C-L specifically, they both were sure that the entire file was emptied. Given the number of documents in the case, it is not surprising that neither Glase nor Dowd could specifically remember seeing exhibits C-L. Similarly, it is not surprising that Rosen did not remember seeing them before. In fact, in November of 1977, it was Parness, not Rosen, who spotted the alleged significance of exhibits C-L and brought it to the attention of Cohn and Rosen.[5] Given the testimony of both Glase and Dowd that

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[5]Parness had not seen the documents before then as Rosen testified that Parness had not accompanied him on his visit to the U.S. Attorney's office.

Rosen had spent several sessions at the U.S. Attorney's office, Rosen's recollection of only one 10-15 minute session there may simply reflect the passage of five years. Accordingly, Parness has failed to sustain his burden of proof.

As for the approximately 150 prolix pages of materials submitted in support of his § 2255 motion, they may be more properly weighed within the context of the statement made by a per curiam panel of the Court of Appeals on January 12, 1976 in *United States* v. *Parness*, 536 F.2d 474, 475 (2d Cir. 1976):

> "We think it is high time that the curtain be brought down on the charade by which appellant Milton Parness — by various motions and frequent substitutions of counsel — has maneuvered for more than 25 months to avoid surrendering to serve his sentence of imprisonment and to avoid paying the $55,000 fine imposed upon him."

Petitioner's motion is denied.[6]
It is so ordered.

DUDLEY B. BONSAL,
United States District Judge

Dated: New York, N.Y.
September 14, 1978

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[6]The Government also points out that it had turned over to the defense tapes containing Goberman's oral recitations of markers owed and paid to him. Parness concedes that these tapes contain references to exhibits C-L. This, too, defeats Parness' motion. "[W]here the defendant is aware of the essential facts enabling him to take advantage of any exculpatory evidence, the Government does not commit a *Brady* violation by not bringing the evidence to the attention of the defense." *United States* v. *Brown*, Dkt. No. 78-1009 (2d Cir. August 7, 1978), slip. op. at 4286.

Appendix B.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 18th day of January, one thousand nine hundred and seventy-nine.

PRESENT:

HON. STERRY R. WATERMAN
HON. MURRAY I. GURFEIN
HON. ELLSWORTH A. VAN GRAAFEILAND
Circuit Judges,

MILTON PARNESS,
Appellant

-against- DOCKET No. 78-2122

UNITED STATES OF AMERICA,
Appellee

Milton Parness appeals from District Judge Bonsal's denial of Parness's motion to vacate sentence under 28 U.S.C. § 2255. Finding no merit in appellant's claims, we affirm.

Appellant contends that he was denied a fair trial because the Government failed to turn over certain allegedly exculpatory documents that were in its files. The district court found that appellant had not proven this to be so. The district court found in addition that the documents in question were discussed in certain tapes that admittedly were in appellant's possession prior to trial. The district court's findings were not clearly erroneous and will not be set aside by this Court.

The posture of the case, then, is that appellant is seeking a new trial on a section 2255 motion based upon the argument that documents he either had or knew about at the time of trial establish his innocence. Those documents, which in this case could not even qualify as newly discovered evidence, will not furnish a basis for appellant's habeas corpus application.

We see no merit in appellant's argument concerning the Government's failure to disclose its occasional misgivings concerning the witness Goberman's veracity and its failure to give the witness a lie detector test. When the Government determined that Goberman was untruthful as to any matter, it informed defense counsel.

The order appealed from is *AFFIRMED*.

STERRY R. WATERMAN
MURRAY I. GURFEIN
ELLSWORTH A. VAN GRAAFEILAND
C.JJ.

Appendix C.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixth day of March, one thousand nine hundred and seventy-nine.

Docket No. 78-2122

MILTON PARNESS,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the appellant, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is
Ordered that said petition be and it hereby is DENIED.

IRVING R. KAUFMAN,
Chief Judge.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixth day of March, one thousand nine hundred and seventy-nine.

Present:

HON. STERRY R. WATERMAN,
HON. MURRAY I. GURFEIN,
HON. ELLSWORTH A. VANGRAAFEILAND,
Circuit Judges.

MILTON PARNESS,
Petitioner-Appellant,

v. Docket No. 78-2122

UNITED STATES OF AMERICA,
Respondent-Appellee.

A petition for rehearing having been filed herein by counsel for the petitioner,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO,
Clerk.

Supreme Court, U. S.
FILED
AUG 1 1979

No. 78-1816

In the Supreme Court of the United States

OCTOBER TERM, 1978

MILTON PARNESS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

CHRISTIAN F. VISSERS
Attorney
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1816

MILTON PARNESS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 8a-9a) and of the district court (Pet. App. 1a-7a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1979. A petition for rehearing was denied on March 6, 1979. The petition for a writ of certiorari was filed on June 4, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner established that the government suppressed exculpatory evidence, thereby necessitating a vacation of his sentence under 28 U.S.C. 2255.

STATEMENT

1. In October 1973, following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on two counts of causing interstate transportation of stolen property, in violation of 18 U.S.C. 2314, on one count of causing interstate travel in furtherance of a scheme to defraud, in violation of 18 U.S.C. 2314, and on one count of acquiring an enterprise affecting interstate or foreign commerce through a pattern of racketeering, in violation of 18 U.S.C. 1962(b). He was sentenced to concurrent ten-year terms of imprisonment on each count and fines amounting to $55,000. The court of appeals affirmed (503 F. 2d 430), and this Court denied certiorari (419 U.S. 1105).

The evidence presented at trial is described in detail in the opinion of the court of appeals on direct appeal from petitioner's conviction (503 F. 2d at 433-435). Briefly, the evidence showed that petitioner defrauded Allan Goberman of his controlling stock interest in the St. Maarten Isle Hotel Corporation, a gambling casino and hotel complex in the Netherlands Antilles. Petitioner was retained by Goberman to collect substantial sums of money owed by tourists and gamblers on junkets to the casino. Instead of remitting money that he collected on behalf of Goberman, however, petitioner diverted that money for his own use. When Goberman suffered financial difficulties in late 1970, petitioner lent him $160,000, a loan made up of money that petitioner previously had converted. Goberman pledged his entire interest in the casino in return for the loan. Thereafter, by continuing to divert or withhold receipts belonging to the casino, petitioner effectively prevented Goberman from obtaining the funds needed to make repayment. Petitioner thereafter foreclosed on the pledged stock and assumed control of the casino.

Following his conviction, petitioner moved for a new trial on the basis of newly discovered evidence purportedly uncovered during a civil suit brought against Goberman. The motion was denied by the district court (408 F. Supp. 440). The court of appeals affirmed that denial in January 1976 (536 F. 2d 474).

In May 1978, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255, claiming that the government had suppressed exculpatory evidence that he later discovered during the civil litigation. The district court held an evidentiary hearing to determine whether the evidence in question had been made available to the defense. At the conclusion of that hearing, the court denied petitioner's motion, finding that petitioner had failed to establish that the documents in question were not given to the defense prior to trial. The court also found that the documents were discussed in considerable detail in certain tape recordings that admittedly were given to petitioner prior to the commencement of trial (Pet. App. 7a n.6). The court of appeals affirmed (Pet. App. 8a-9a).

ARGUMENT

Petitioner argues (Pet. 11-14) that his conviction must be vacated because the government withheld exculpatory evidence. The record establishes, however, that the evidence was made available to petitioner prior to trial. Moreover, there is no basis for the assertion that the evidence proves his innocence.

1. At the conclusion of the hearing on petitioner's motion to vacate his sentence, the district court credited the testimony of the government witnesses that petitioner's attorneys had been afforded "open file" discovery prior to trial and that one of his attorneys had inspected all the government documents relating to the

case (Tr. 39, 80, 97, 101).[1] The government also proved, through evidence establishing continuous chain of custody, that the documents in question (Exhibits C-L) were among the materials presented to petitioner's attorneys for pre-trial examination.[2] Having disclosed its entire file to the defense prior to trial, the government more than satisfied the disclosure requirements needed to assure a fair trial. See *United States* v. *Agurs*, 427 U.S. 97, 109 (1976). The district court's factual finding, affirmed by the court of appeals, that the government made "open file" disclosure, including Exhibits C-L, was amply supported by the record, and there is no occasion for further review of that determination. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

In addition to opening its files to petitioner prior to trial, the government also tendered certain tape recordings in which Goberman referred to and discussed the content of Exhibits C-L. Those tapes not only served to alert petitioner and his counsel to the existence of the documents, but also disclosed much of their substance. As the district court noted, a defendant is not deprived of a fair trial when he is aware of the essential facts enabling him to take advantage of exculpatory evidence, all of which is freely available (Pet. App. 7a n.6). See *United States* v. *Craig*, 573 F. 2d 455, 492 (7th Cir. 1977), cert. denied, No. 77-1499 (Oct. 2, 1978); *United States* v. *Brown*, 562 F. 2d 1144, 1151 (9th Cir. 1977); *United States* v. *Erb*, 543 F. 2d 438, 443 (2d Cir.), cert. denied, 429 U.S. 981 (1976).

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[1] "Tr." refers to the transcript of the hearing on petitioner's motion to vacate sentence. "T. Tr." refers to the trial transcript. "J.A." refers to the joint appendix filed in the court of appeals in this case.

[2] The documents in question appear at J.A. 61-89.

2. Despite the fact that he was represented by experienced counsel who inspected the government's entire file prior to trial, and who were given tapes discussing the evidence that petitioner claims was exculpatory, petitioner asserts that his conviction must be set aside because that evidence might have been used to show his innocence. Petitioner argues that the documents in question could have been used to impeach Goberman's testimony that petitioner wrongfully withheld $400,000 from the casino (Pet. 9). However, claims of "newly discovered evidence" bearing on the merits of a case must be raised in a motion for a new trial within two years of the date of conviction (the present Section 2255 motion was filed 4 and 1/2 years after conviction). See Fed. R. Crim. P. 33. The time limit prescribed by Rule 33 may not be exceeded. See *United States* v. *Smith*, 331 U.S. 469 (1947); *United States* v. *Beran*, 546 F. 2d 1316, 1319 n. 1 (8th Cir. 1976), cert. denied, 430 U.S. 916 (1977); *Oddo* v. *United States*, 171 F. 2d 854, 858 (2d Cir. 1949). After that time, any redress that may be just and appropriate on the basis of newly discovered evidence (and in the absence of a showing of a due process violation that would justify collateral relief) must be sought through recourse to the President's power of pardon and commutation. Collateral attack on a lawful sentence is not a substitute for a timely motion for a new trial based on newly discovered evidence.[3]

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[3]Although this Court has approved collateral proceedings to determine "whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt" (*Jackson* v. *Virginia*, No. 78-5283 (June 28, 1979), slip op. 10-11), it has never suggested that collateral proceedings are an appropriate vehicle to retry the merits of a criminal case whenever the defense wishes to proffer new evidence. Such a procedure would wholly nullify the time limits prescribed by Fed. R. Crim. P. 33, a result that is particularly inappropriate where the "newly discovered evidence" was available to the defense from the beginning but was passed over through either neglect or tactical choice.

In any event, petitioner's belated contention that Exhibits C-L could have been used to impeach Goberman's testimony and thereby establish his innocence is insubstantial. The government's proof at trial showed that petitioner's loan to Goberman was in fact made up of converted funds wrongfully withheld from Goberman. Goberman testified, subject to extensive cross-examination, that petitioner withheld approximately $400,000 during the period immediately prior to making the loan (T. Tr. 70, 462).[4] Through the testimony of a business associate, the government established that petitioner's income derived almost exclusively from his collections for Goberman (T. Tr. 595, 598-600). Moreover, the evidence showed that petitioner devised and executed an elaborate scheme to conceal the source of the loan, including false bookkeeping entries; he also masked his interest in the foreclosure proceeding that effectively transmitted casino ownership from Goberman to himself (T. Tr. 86-88, 100-102, 118, 703, 811-812, 851, 869-870, 1399, 1405-1411). As the court of appeals observed on direct appeal from petitioner's conviction (503 F. 2d at 437):

> The jury surely was justified in concluding that all [the false representations] were part of [petitioner's] scheme to cover up his coversion of money due Hotel Corp. In short, in the context of this record and in view of the complete absence of any credible explanation as to the source of funds used in connection with the Goberman loan, we fail to see how the jury could have reached any

[4]Goberman's testimony was based on his analysis of gambling debts incurred by casino patrons. He testified that government exhibits 167-177, which were tally sheets of casino winnings and losses, formed part of the basis for his calculation. He also relied on past recollection and tally sheets no longer available (T. Tr. 460-471).

> conclusion except that [petitioner] had withheld marker collections and had used the proceeds of such collections and the front money to acquire Goberman's interest in Hotel Corp.

In his motion for a new trial, petitioner attacked Goberman's trial testimony, contending that the deposition evidence obtained during his civil litigation with Goberman established that Goberman had exaggerated the amount of money that petitioner diverted. On analysis of petitioner's "newly discovered evidence," the district court concluded that the evidence was not newly discovered and did not serve to impeach Goberman's testimony. The district court pointed out that the subject matter of petitioner's "new" evidence had been explored both on direct and cross examination at trial (408 F. Supp. at 443-444).

The substance of petitioner's present collateral attack on his conviction is not materially different from that of his prior motion for a retrial. Once again, he contends that he has discovered new evidence stemming from his civil litigation that shows that Goberman exaggerated the amount that he diverted. He claims that, under a more accurate accounting, the evidence would show that Goberman owes him money rather than the converse.[5] However, the exhibits that petitioner relies on are simply undated scratch sheets, apparently relating to some, but not all, of the debts reflected in the original casino tallies

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[5]In support of this argument, petitioner refers (Pet. 4) to the fact that he ultimately prevailed in the civil action involving Goberman. The suit was originally filed by Goberman against petitioner and petitioner pleaded a counterclaim. Petitioner neglects to explain that the judgment that he obtained in this proceeding was a default judgment. Goberman, who was insolvent and judgment proof (T. Tr. 4), defaulted because he lacked the funds to prosecute the litigation (J. App. 151).

(Gov. Ex. 167-177). Those original tallies, in turn, related to only some of the casino debts that petitioner was authorized to collect.[6] Thus, the documents are not determinative of the total amount owed by petitioner to Goberman, since they do not relate to all of the relevant business dealings between the parties. In sum, contrary to petitioner's contention, the partial computations appearing on the documents in question do not prove that Goberman's testimony was false or that petitioner was innocent of the offenses charged in the indictment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

CHRISTIAN F. VISSERS
Attorney

JULY 1979

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[6]Some of the original tally sheets were unavailable at trial. Goberman's estimate of petitioner's debt rested on personal recollection and prior computations made with materials no longer available (T. Tr. 464, 470, 548-551). During summation, petitioner's counsel vigorously argued that the jury should not credit Goberman's testimony about the size of the debt because Goberman had not produced all of the supporting documentation (T. Tr. 1618-1619). The jury chose to believe Goberman's testimony, which was supported by the circumstantial evidence discussed on page 6, *supra*.

DOJ-1979-07